

Case No. 1160002

IN THE SUPREME COURT OF ALABAMA

ROY S. MOORE,)
Chief Justice of the)
Alabama Supreme Court,)
)
Appellant,)
)
v.)
)
ALABAMA JUDICIAL INQUIRY)
COMMISSION,)
)
Appellee.)

APPELLANT CHIEF JUSTICE ROY S. MOORE'S
MOTION FOR RECUSAL OF FOUR JUSTICES OF THE
ALABAMA SUPREME COURT AND FOR OTHER RELIEF

Appellant Roy S. Moore, Chief Justice of the Alabama Supreme Court, hereby moves for the recusal of four of the Justices of the Alabama Supreme Court in this matter and the selection of replacement Justices by a random drawing from a pool of names consisting of all sitting Alabama circuit judges.

BRIEF IN SUPPORT

I. Disqualification

- A. **The Three Present and Three Former Justices Who Sat on Case No. 1150818, Ex parte Roy S. Moore (In re: Roy S. Moore v. Judicial Inquiry Commission of the State of Alabama), Are Disqualified from Participating in This Appeal by Their Manifest Bias Against the Chief Justice.**

Because Case No. 1150818 has been maintained under seal by the present and former justices who sat on that case, the argument for this section is not presented in this public filing. However, the facts presented in the attached Sealed Affidavit of Chief Justice Roy S. Moore amply demonstrate that the Justices, present and former, who sat on Case No. 1150818, have disqualified themselves by their biased and unconscionable actions in that case not only from participating in this case but also from playing any role in selecting a substitute Court. See Moore v. Judicial Inquiry Comm'n, Civil No. 2:16cv388-WHA (M.D. Ala. Aug. 4, 2016) (noting that "certain Justices of the Supreme Court of Alabama did not recuse themselves from ruling on [Case No. 1150818]"). Media organizations and members of the public, if they so choose, may intervene in Case No. 1150818 to demand that the records of that case be made public. See Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597-98 (1978) ("[T]he courts of

this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

B. Justice Shaw is disqualified by reason of statements he made in his concurring opinion in Case No. 1140460, Ex parte State ex rel. Alabama Policy Institute (Ala. March 4, 2016) ("API").

In his API writing, Justice Shaw suggested that the Administrative Order of January 6, 2016 that is at issue in this case disqualified Chief Justice Moore from participating in that case. That very question is the subject of one of the charges brought by the JIC which the Court of the Judiciary addressed in the judgment that is now on appeal to this Court. Justice Shaw also characterized the Administrative Order as saying "that Obergefell did not impact this Court's [first API decision]." That assertion is also a contested issue in this case. Because Chief Justice Shaw has made statements about the merits of this appeal, he is disqualified from participating in it.

II. The Selection of Replacement Justices

A. The Selection Pool

Chief Justice Moore requests that replacement Justices be selected by a random and publicly observable drawing from a pool of sitting circuit judges.

B. The Mechanism of Selection

The Alabama Code specifies a mechanism for appointing special justices when the membership of the Court falls below six:

[W]hen by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six, the fact shall be certified by the Chief Justice, if he is competent to sit, or, if not, by the judge or judges sitting, or, if no one is competent, by the clerk of the court to the Governor, who shall thereupon appoint members of the bar of the Supreme Court to constitute a special court of seven members for the consideration and determination of such case.

§ 12-2-14, Ala. Code 1975. Pursuant to the statute, the Governor appoints a replacement Court of seven members when "by reason of disqualification no one of the judges is competent to sit in a case or the number is reduced below six." The Alabama Supreme Court, however, declared this provision unconstitutional insofar as it mandated that the Governor rather than the Chief Justice has the power to appoint replacement justices. City of Bessemer v. McClain, 957 So. 2d 1061, 1090-1095 (Ala. 2006) (On Second Application for Rehearing).

According to the *McClain* opinion, Article VI, § 149, of the Alabama Constitution trumps § 12-2-14. Section 149 states: "The chief justice may assign appellate justices and

judges to any appellate court for temporary service and trial judges, supernumerary justices and judges, and retired trial judges and retired appellate judges for temporary service in any court." Although in the current circumstance the duty of selecting replacement Justices ordinarily would fall to the Acting Chief Justice, that individual is disqualified from playing any part in this case, even that of selecting a substitute Court, by her unwarranted actions in Case No. 1150818, as detailed in the Sealed Affidavit of the Chief Justice. The same is true of the next Justice in seniority. As precedent, see Hornsby v. Sessions, 703 So. 2d 932 (Ala. 1997), wherein the Chief Justice and the Senior Associate Justice "individually determined that they were disqualified to make an assignment of a Special Supreme Court." Id. at 935 n.2.

Therefore, the management of the process of selecting replacement justices should be made by the senior qualified sitting justice of the Supreme Court. See § 12-2-6, Ala. Code 1975.

IV. Conclusion

The selection of replacement Justices should be made by a random drawing from a pool of names consisting of all sitting circuit judges. **The present and former Justices who participated in Case No 1150818, Ex parte Roy S. Moore, should play no part in deciding this case or in selecting the replacement Court, nor, for the reasons stated above, should Justice Shaw.**

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 10th day of October, 2016, served a copy of this *Motion for Recusal of Four Justices of the Alabama Supreme Court and For Other Relief*, and brief in support thereof, on the Judicial Inquiry Commission and counsel below through electronic mail:

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EXHIBIT A

Affidavit of
Chief Justice Roy S. Moore

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